

FOO TONG ENG v. PO GUN SUAN

[O.C.J. (Arulanandom J.) July 28, September 25,
November 17, 1980; July 6, 15 & 24, 1981]

[Penang — Originating Summons No. 294 of 1980]

Company Law — Application to hold extraordinary general meeting — Respondent's refusal to attend meeting stultifying company's operation — Court's intervention.

The applicant held a majority of 5,000 shares in the company. The respondent had 1,000 shares in the said company. As Managing Director of the company, the applicant sought to hold an extraordinary general meeting (EOGM) on May 12, 1980. The respondent refused to attend and by a letter dated May 6, 1980, the respondent informed the applicant not to commence the meeting as the respondent claimed that it was for the purpose of oppressing minority rights. On May 12, 1980 the EOGM could not be held as the respondent did not attend the meeting and also because there was no quorum. The applicant submitted, *inter alia*, that the respondent had unlawfully retained valuable documents including account books of the company. The applicant sought for the order to allow (a) an EOGM to be held a week from the date of the Order, (b) one week's Notice of such EOGM be given to the respondent or his solicitors, (c) a direction that if the respondent fails to attend the said meeting, the applicant by himself attending the meeting shall be deemed to constitute a meeting, and (d) costs.

Held, allowing the application: (1) if the respondent who held 10% of the shares in the company considered himself an oppressed minority, his remedy would lie in his petitioning for dissolution of the company as an oppressed minority and not stultifying the operation of the company and cause it irreparable damage;

(2) no court of Law or Equity could condone such conduct let alone buttress it with the sanction of the court. Common sense would require that the company should be allowed to function and any aggrieved party should obtain redress through the remedies recognised by law and open to him.

ORIGINATING SUMMONS.

S.M. Mathuram for the applicant.

Goh Lim Eam for the respondent.

Arulanandom J.: This was an application by the applicant for the following orders:—

- “(a) That the applicant Foo Tong Eng be at liberty to call an extra-ordinary General Meeting 1 week from the date of the Order herein.
- (b) That 1 week's Notice of such extra-ordinary meeting be given to the respondent or his solicitors.
- (c) A direction that if the respondent fails to attend the said meeting, the applicant by himself attending the meeting shall be deemed to constitute a meeting.
- (d) Costs.”

The grounds for the application are set out in the affidavit of the applicant affirmed on June 9, 1981. As this gives the grounds in a concise form, the contents are repeated here.

“1. I am the applicant herein and also the Managing Director of the Company in question who holds the majority shares in the said company.

2. On the 17th of April 1980 I wrote to the Secretary of Marclyn Sdn. Bhd., to convene an extra-ordinary General Meeting of the Company for the purpose of increasing the number of Directors from two to four. (A copy of my letter is enclosed herewith and marked as Exhibit 'A'.)

3. By a Notice dated the 18th April 1980 the respondent who is the other Director of the Company was duly informed that an extraordinary General Meeting will be held on the 12th May 1980 at No. 19, Bishop Street, Penang. (A copy of the said Notice dated the 18th April 1980 is annexed herewith and marked as Exhibit 'B'.)

4. However it appears that the respondent had no intention of attending at the meeting and by letter dated the 6th May

A 1980 through his Solicitors informed me not to convene the meeting as the respondent claimed that it was for the purpose of oppressing minority rights. (A copy of the said letter is now produced and annexed herewith marked as Exhibit 'C'.)

B 5. On the 12th of May 1980 the said extraordinary General Meeting could not be held as the respondent did not attend the meeting and also because there was no quorum. Accordingly the meeting was adjourned for 1 week and notice was duly given on the 13th May 1980. Again the respondent replied through his solicitors on the 15th May 1980 that the meeting should not be convened. (A copy of the said letter dated the 15th May 1980 is annexed herewith marked as Exhibit 'D'.)

(a) Article 35 of the Articles of Association of the said Company under the heading 'Proceeding at General Meeting' reads as follows:—

C 'No business shall be transacted at any General Meeting except the adjournment of the meeting unless a quorum of members is present at the time when the meeting proceeds to business, and such quorum shall consist of not less than two members present personally or by proxy.'

(b) Article 62 of the Articles of Association by the said Company under the heading 'Proceedings of Directors' read as follows:—

D 'the Quorum necessary for the transaction of business shall be not less than two.'

7. If the said respondent refuses to attend the meeting the Company will not be able to function.

8. I have 5,000 shares in the Company and the respondent has 1,000 shares on the said company.

9. I am the Managing Director of the said Company and the said respondent is interfering with the running of the Company for the following reasons:—

E (a) The respondent is portraying to the business community a bad image of the Company causing it to suffer losses which may mean the end of the Company

(b) Unlawfully retaining valuable documents of the Company thereby inhibiting the carrying on of business. (A copy of a letter dated the 13th May 1980 forwarded to the respondent is annexed herewith and marked as Exhibit 'E').

F (c) Unlawfully removed a motor-lorry No. PE 3994 to a workshop Messrs. Beng Hin Motors where the front two wheels have been removed and who have now refused to hand over the lorry despite the fact that regular payments have been made on overdue bills thereby affecting the business of the Company.

(d) Receiving payments due to the Company from Creditors without crediting it into the Company funds.

G 10. Furthermore the applicant is also unable to forward the Accounts to the Company's Accountants to draw up the Statement of Accounts for the financial year ending 30th April 1980 because of the retention of the Account Books of the Company by the respondent.”

It is quite obvious from the facts given above that the company involved is not a company registered under the Companies Act for the purpose of limiting liability but purely for convenience, and perhaps to reduce tax liability. In these cases as long as the parties are “*ad idem*” nobody knows what happens within the company and nobody cares. But when the parties fall out then, if one party refuses to co-operate and takes a completely negative attitude, the company cannot function without the intervention of the court.

H The respondent resists the application on the grounds that he will suffer irreparable harm although what the harm would be has not been spelt out.

But whatever his objection the court is aware that by the respondent's refusal to attend the duly constituted meeting of the company, in view of the provisions of the Articles of Association, he has literally

paralysed the company and reduced it to a state of complete helplessness and also exposed the company to penalties for non-compliance with the Companies Act 1965 and other laws of the country, e.g. income tax. Furthermore if the respondent who holds only 10% of the shares in the company considers himself an oppressed minority, his remedy would lie in his petitioning for dissolution of the company as an oppressed minority and not stultifying operations of the company and cause it irreparable damage. No Court of Law or Equity could condone such conduct let alone buttress it with the sanction of the court. Common sense would require that the company should be allowed to function and any aggrieved party should obtain redresses through the remedies recognised by law and open to him. The court therefore allowed the application in terms of the prayers in the originating summons.

Application allowed.

Solicitors: *Mathuram & Co.; Goh Lim Eam & Co.*

TAN LAI v. MOHAMED BIN MAHMUD & ORS.

[O.C.J. (Salleh Abas F.J.) August 26 & September 14, 1981]

[Kuala Trengganu — Civil Suit No. 106 of 1974]

Contract — Guarantee — Sawmill licence granted to first defendant and another — Licence not transferable — Incorporation of company to work sawmill licence — Company originally virtually controlled by plaintiff — Shares in company subsequently sold to first defendant — Delayed payment — Guarantee given by defendants — Claim on guarantee — Whether contract illegal.

A sawmill licence had been granted to the first defendant and another to operate a sawmill. The licence was not transferable. A company was formed to work the sawmill licence, with a \$200,000.00 capital, of which 75% was held by the plaintiff and the remaining 25% by the first defendant and the other licensee. Subsequently the plaintiff sold his shares in the company to the first defendant. The plaintiff accepted delayed payment but obtained a guarantee from the other three defendants. Defendant No. (1) paid \$12,000.00 towards the purchase price but refused to pay the outstanding balance of \$43,000.00. The plaintiff sued the defendants for the amount due. The defendants claimed that the sale of the shares and the guarantee agreement were illegal.

Held: (1) the agreements pursuant to which the company was incorporated were illegal as the agreements amounted to an attempt to circumvent the condition of the licence as to its non-transferability to non-licensees;

(2) however the incorporation of the company was perfectly lawful and while its operation of the sawmill was illegal as it had no sawmill licence to cover the operation, the sale of the shares and the guarantee agreement for the purpose of making the company's operations come within the ambit of legality were not illegal;

(3) the plaintiff was therefore entitled to judgment for the balance of \$43,000.00 due on the agreement.

Cases referred to:-

- (1) *R. v. Registrar of Joint Stock Companies* [1931] 2 K.B. 197.
- (2) *Bowmakers Ltd. v. Barnet Investments Ltd.* [1944] 2 All E.R. 579, 582.
- (3) *Sajan Singh v. Sardara Ali* [1960] M.L.J. 52; [1960] 1 All E.R. 269.
- (4) *Devanai v. Chinniah & Ors.*, Kuala Trengganu Civil Suit No. 41 of 1967 (unreported).

CIVIL SUIT.

Gurbakhash Singh for the plaintiff.

S.E. Rajah for the defendant.

Cur. Adv. Vult.

A **Salleh Abas F.J.:** In this case counsel for both parties agreed not to call oral evidence. They relied upon the facts as disclosed in the pleadings and the agreed bundle of documents, which are as follows.

Upon being told by the State Forest Officer that their application to erect a sawmill at Batu Rakit was approved, the defendant No. (1) and one Cik Chik bt. Haji Mohamed (not a party to this suit) signed two agreements with the plaintiff. The first agreement was signed on July 6, 1972, whilst the second one on December 13 of the same year. These two agreements, identical in terms, made provision for the incorporation of a company to be named as Perusahaan Kayu Rakit Sdn. Bhd. (in this judgment referred to as the company) "to work the said sawmill licence", with a \$200,000 capital of which 75% was to be held by the plaintiff and the remaining 25% by the defendant No. (1) and Cik Chik. It was also agreed that the management and control of the company was to be the sole responsibility of the plaintiff. Accordingly the company was incorporated on November 18, 1972 and the licence to erect and operate a sawmill was issued to the defendant No. (1) and Cik Chik on June 7, 1973. The company has since been operating its sawmill presumably by relying upon this licence. Subsequently a dispute arose between the plaintiff and the defendant No. (1) and the dispute was finally settled by the plaintiff opting out of the company and selling all his shares to the defendant No. (1) for \$55,000. As the defendant No. (1) was unable to make immediate payment for these shares, on May 24, 1974 he and the defendant No. (2), (3) and (4) and the plaintiff signed a guarantee agreement whereby in consideration of the plaintiff accepting delayed payment for the shares the other three defendants gave a guarantee for such payment. The defendant No. (1) has so far paid \$12,000, and refused to pay the outstanding balance of \$43,000. When sued for the recovery of this amount, all the four defendants claimed that the sale of shares to the defendant No. (1) and the guarantee agreement were illegal and that the plaintiff's suit should therefore be dismissed. The defendants also counterclaimed for the return of \$12,000 previously paid to the plaintiff on the ground that the payment was made under a mistake of law.

At the start of the hearing before me counsel for both sides agreed to submit for my decision without calling any oral evidence an issue of law whether or not the guarantee agreement was illegal. If so, counsel agreed that the plaintiff's claim should be dismissed and if it is otherwise judgment for the plaintiff in the sum of \$43,000 should be entered. The counterclaim of \$12,000 was dropped. In my view this was rightly done because if the payment was made under an illegal contract as was contended by the defendants under no circumstances could they rely upon that same contract to recover the amount so paid. Hence the dropping of the counterclaim was properly done.

The sawmill licence in this case authorises "the defendant No. (1) and Cik Chik to erect and/or operate a sawmill at Batu Rakit to be known as the Perusahaan Kayu Batu Rakit Sdn. Bhd. for the period or periods specified below subject to the following conditions..."

One of the conditions is condition No. (1) in that the licence shall not be transferable. In my judgment so